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SHORT FORM ORDER

INDEX No. 10-37309

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 6-20-13
ADJ. DATE 7-18-13
Mot. Seq. # 003 - MotD

COPY

LUIS PALMA,

Plaintiff,

- against -

BUILDING BLOCKS REALTY CO., LLC, G & M CONSTRUCTION CORP., and WRAP-N-PACK, INC.,

Defendants.

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Attorney for Building Block and Wrap-N-Pack
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G & M CONSTRUCTION CORP.,

Third-Party Plaintiff,

- against -

CHASE CONSTRUCTION ENTERPRISES, LLC,

Third-Party Defendant.

JOHN L. JULIANO, P.C.
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BUILDING BLOCKS REALTY COMPANY, LLC and WRAP-N-PACK, INC.,

Third-Party Plaintiffs,

- against -

CHASE CONSTRUCTION ENTERPRISES, LLC,

Third-Party Defendant.

Upon the following papers numbered 1 to 30 read on this motion for leave to amend answer and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 24; 25 - 27 ; Replying Affidavits and supporting papers 28 -30 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the third-party defendant for an order pursuant to CPLR 3025 (b) amending its answers to the third-party complaint and second third-party complaint to include the affirmative defense that the claims of the third-party plaintiff and second third-party plaintiff are barred by Workers' Compensation Law § 11 and for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and second third-party complaint is granted to the extent that the third-party defendant is permitted to amend its answer to include the affirmative defense, that the answer, in the form annexed to the moving papers, is hereby deemed served, and that the third-party defendant is granted summary judgment dismissing the second third-party complaint and the first, second, fourth, seventh, and eighth causes of action in the third-party complaint, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on July 9, 2010, when he fell off of a scaffold while he was working for the third-party defendant ("Chase") at a construction site. At the time of the incident, Chase was a subcontractor of defendant and third-party plaintiff G & M Construction Corp. ("G & M"), the general contractor for the project. Defendants and third-party plaintiffs Building Blocks Realty Company, LLC and Wrap-n-Pack, Inc. ("Building Blocks" and "Wrap") are the owners of the premises.

In the complaint and the bill of particulars, the plaintiff asserts causes of action against the defendants for common-law negligence and for violations of Labor Law §§ 200, 240 (1) and 241 (6). The plaintiff alleges that the defendants were negligent in, *inter alia*, failing to provide him with a safe place to work.

A third-party complaint was filed by G & M against Chase and a second third-party complaint was filed by Building Blocks and Wrap against Chase. Both complaints are identical and assert eight causes of action. The first cause of action seeks damages based on the fact that the plaintiff claimed that the injuries which he sustained constituted a "grave injury" as defined in Workers' Compensation Law § 11. The second cause of action seeks common-law indemnification. The third cause of action seeks contribution. The fourth cause of action also seeks common-law indemnification. The fifth cause of action seeks contractual indemnification based on the "Indemnification, Hold-Harmless Insurance Agreement" entered into between the parties. The sixth cause of action seeks contractual indemnification based on the "Annual Subcontractor Agreement" entered into between the parties. The seventh cause of action seeks damages for Chase's alleged failure to procure insurance naming G & M, Building Blocks, and Wrap as additional insureds pursuant to the "Indemnification, Hold-Harmless Insurance Agreement," and the eighth cause of action seeks damages for Chase's alleged failure to procure insurance naming G & M, Building Blocks, and Wrap as additional insureds pursuant to the "Annual Subcontractor Agreement."

Chase now moves to amend its answers to the third-party complaint and second third-party complaint to include the affirmative defense that the claims of G & M, Building Blocks, and Wrap are barred by Workers' Compensation Law § 11. In addition, Chase moves for summary judgment based on that ground.

Leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or devoid of merit (*see* ***Sabatino v 425 Oser Ave., LLC***, 87 AD3d 1127, 930 NYS2d 598 [2d Dept 2011]; ***Jablonski v Jakaitis***, 85 AD3d 969, 926 NYS2d 137 [2d Dept 2011]).

Here, Chase seeks to amend its answers to include the affirmative defense that the claims of G & M, Building Blocks, and Wrap are barred by Workers' Compensation Law § 11. Since this defense is not palpably insufficient or devoid of merit, and G & M, Building Blocks and Wrap have not established prejudice or surprise (*see* ***Sabatino v 425 Oser Ave., LLC***, *supra*; ***Truebright Co., Ltd. v Lester***, 84 AD3d 1065, 922 NYS2d 815 [2d Dept 2011]), the branch of Chase's motion seeking leave to amend its answers to include this affirmative defense is granted.

Turning to the branch of Chase's motion which is for summary judgment dismissing the complaint, it is axiomatic that summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

It is well settled that

> "Workers' Compensation Law § 11 bars a third-party action for contribution or indemnification against an employer when its employee is injured in a work-related accident unless the employee has sustained a grave injury or the claim for contribution or indemnification is based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (***Bovis v Crab Meadow Enters., Ltd.***, 67 AD3d 846, 847-848, 899 NYS2d 634, 636 [2d Dept 2011] [internal quotation marks omitted]).

In addition, as a general rule

> "indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed . . . Therefore, such an agreement cannot be held to have a retroactive effect unless by its express words or necessary implication it clearly appears to be the parties' intention to include past

> obligations . . . Thus, an indemnification agreement executed by a party after the plaintiff's accident occurred will not be applied retroactively in the absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the agreement to apply as of that date" (***Mikulski v Adam R. West, Inc.***, 78 AD3d 910, 911-912, 912 NYS2d 233, 234 [2d Dept 2010] [internal citations and quotation marks omitted]).

Here, it is undisputed that the plaintiff did not suffer a "grave injury" as defined in Workers' Compensation Law § 11. As a result, the first cause of action in both the third-party complaint and the second third-party complaint must be dismissed as they both seek damages based on the fact that the plaintiff suffered a "grave injury." The second and fourth causes of action in the third-party and second third-party complaints, which both seek damages based on common-law indemnification, must likewise be dismissed since Chase cannot be held liable for common-law indemnification unless the plaintiff sustained a "grave injury" (*see* Workers' Compensation Law § 11; ***Picaso v 345 E. 73 Owners Corp.***, 101 AD3d 511, 956 NYS2d 27 [1st Dept 2012]).

With respect to the third, fifth, and sixth causes of action in both the third-party complaint and the second third-party complaint, which seek contribution and contractual indemnification, the court notes that while Chase entered into an "Indemnification, Hold-Harmless Insurance Agreement" and an "Annual Subcontractor Agreement" with G & M in which it agreed to indemnify not only G & M but Building Blocks and Wrap as well, both agreements were not executed until September 2, 2010. Since those agreements were not executed until after the plaintiff's accident, G & M, Building Blocks, and Wrap cannot recover for contribution or contractual indemnification from Chase based on those agreements (*see* Workers' Compensation Law § 11; ***Mikulski v Adam R. West, Inc.***, *supra*). While G & M, Building Blocks, and Wrap assert in opposition that those agreements should be applied retroactively, it is undisputed that the agreements were executed after the plaintiff's accident, there is no language in either agreement indicating that Chase, G & M, Building Blocks, and Wrap intended its terms to be retroactively applied or that the agreements' effective dates were intended to be any date other than the date that they were executed (*see* ***Mikulski v Adam R. West, Inc.***, *supra*). As a result, G & M, Building Blocks, and Wrap have failed to establish the existence of a triable issue of fact with respect to those agreements.

However, Chase entered into a contract with G & M on May 7, 2010, prior to the plaintiff's accident, wherein it agreed to "hold Contractor [G & M] completely harmless from and . . . defend and indemnify Contractor against all costs, damages, losses, and expenses, including reasonable attorney's fees, resulting from claims arising from causes mentioned in this paragraph." The causes mentioned in the paragraph included "damages to persons or property occasioned by Subcontractor [Chase] or Subcontractor's employees, materialmen, sub-subcontractors, agents and invitees." Thus, an issue of fact exists as to whether G & M can recover for contribution and contractual indemnification from Chase based on the May 7, 2010 contract. Since Building Blocks and Wrap were not a party to that contract, and nowhere in that contract does it state that Chase would hold Building Blocks and Wrap harmless or indemnify them, the third, fifth, and sixth causes of action in the second third-party complaint are dismissed.

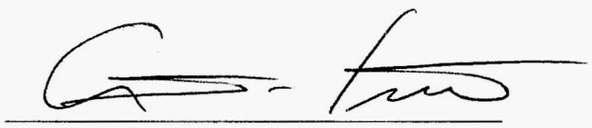
Turning to the seventh and eighth causes of action in both the third-party and second third-party complaints, which seek damages for Chase's alleged failure to procure insurance naming G & M, Building Blocks, and Wrap as additional insureds, Chase established its *prima facie* entitlement to judgment

dismissing these causes of action. As a general rule, an agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify (*see* ***Turner Constr. Co. v Pace Plumbing Corp.,*** 298 AD2d 146, 748 NYS2d 356 [1st Dept 2002]; *see also* ***Kinney v G.W. Lisk Co.***, 76 NY2d 215, 557 NYS2d 283 [1990]; ***McGill v Polytechnic Univ.***, 235 AD2d 400, 651 NYS2d 992 [2d Dept 1992]). Here, Chase was obligated to name G & M, Building Blocks, and Wrap as additional insureds pursuant to the "Indemnification, Hold-Harmless Insurance Agreement" and the "Annual Subcontractor Agreement." However, as noted above, these agreements were both signed after the plaintiff's accident. In any event, Chase established that G & M, Building Blocks, and Wrap were additional insureds on Chase's general liability insurance by submitting a copy of its insurance policy which includes a blanket additional insured endorsement. In opposition, G & M, Building Blocks, and Wrap failed to raise a triable issue of fact and merely argue that Chase's insurer declined to provide coverage for this claim. To the extent that G & M, Building Blocks, and Wrap argue that they have been denied a defense by Chase's insurer, the Court notes that the appropriate action on that claim would be a plenary action for declaratory judgment against the insurer (*see* ***Mortillaro v Public Serv. Mut. Ins. Co.*** 285 AD2d 586, 728 NYS2d 185 [2d Dept 2001]).

Accordingly, Chase's motion is granted to the extent that Chase is permitted to amend its answer to include the affirmative defense that the claims of G & M, Building Blocks, and Wrap are barred by Workers' Compensation Law § 11, that the answer, in the form annexed to the moving papers, is hereby deemed served, and that Chase is granted summary judgment dismissing the second third-party complaint and the first, second, fourth, seventh, and eighth causes of action in the third-party complaint.

The Court directs that the claims as to which summary judgment were granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: October 8, 2013



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION